

Local Union No. 513, International Union of Operating Engineers, AFL-CIO (Various Employers) and Michael J. Vitale. Case 14-CB-7719

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On May 8, 1992, Administrative Law Judge Bernard Reis issued the attached decision. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local Union No. 513, International Union of Operating Engineers, AFL-CIO, St. Louis, Missouri, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(a).

“(a) Refusing to make available to Michael Vitale the job referral information requested in his August 24, 1991 letter.”

2. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

“(a) Make available to Michael J. Vitale the job referral information requested in his August 24, 1991 letter.”

¹The administrative law judge declined to order the Respondent to provide Charging Party Vitale access to the job referral information he sought in his August 24, 1991 letter, finding that it would be useless to Vitale at this time. In his exceptions, however, Vitale contends that the information would still be of use to him for, inter alia, a potential cause of action under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq. We therefore shall modify the judge's Order to require the Respondent to make available to Vitale the information sought in his original request, i.e., information concerning referrals during the 6-month period prior to the request. Although Vitale also requested that the Respondent post the information in the union halls and provide it to union members by mail on request, we find nothing in the record of this case warranting the inclusion of such provisions in the Order.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO REGISTRANTS AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to make available to Michael J. Vitale the job referral information requested in his August 24, 1991 letter.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make available to Michael J. Vitale the job referral information requested in his August 24, 1991 letter.

LOCAL UNION NO. 513, INTERNATIONAL UNION
OF OPERATING ENGINEERS, AFL-CIO

Caryn L. Fine, Esq., for the General Counsel.

Harold Gruenberg, Esq., of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

BERNARD RIES, Administrative Law Judge. This case was tried in St. Louis, Missouri, on January 13, 1992. The complaint alleges, in material part, that the Respondent, Local Union No. 513, International Union of Operating Engineers, AFL-CIO, has violated Section 8(b)(1)(A) of the Act since about August 30, 1991, by failing and refusing to provide certain referral records requested by the Charging Party which are reasonably related to an alleged failure to refer the Charging Party to jobs “because he engaged in intraunion political activities or other protected concerted activities.”¹

A brief was served by General Counsel on February 14, 1992; no brief has been received from Respondent. I have reviewed the transcript, the exhibits, and the General Counsel's brief, and I have considered my recollection of the testimony given by the Charging Party, the only witness in the case. Having done so, I reach the following

¹Although the answer to the complaint denies any violation of the law, it effectively admits that the Board's assertion of jurisdiction in this case is appropriate, and that the Respondent is a labor organization within the meaning of Sec. 2(5) of the Act.

FINDINGS OF FACT²

I. THE ISSUE

Michael J. Vitale, the Charging Party, is a heavy equipment operator who performs construction work in the St. Louis area. Vitale has been a member in good standing of Respondent since 1964, although for two portions of that period, January 1982 to June 1985 and August 1987 to August 1990, he left the trade to pursue other endeavors.

Beginning in 1989, even before he returned to work as an operating engineer from his last nonconstruction job, Vitale was active as a political opponent to the incumbent administration of Respondent. He also believed that, after he returned to the trade in August 1990, he was not getting his share of referrals to jobs from Respondent's referral system. Accordingly, on August 24, 1991, Vitale wrote a letter to Respondent seeking certain information pertaining to referrals in the preceding 6 months. Respondent's attorney replied on September 17, rejecting the request. It is the theory of the complaint that Vitale was entitled to the requested records because they are "reasonably related to an alleged failure to properly refer Charging Party Vitale to jobs . . . because he engaged in intraunion political activities."

II. THE FACTS

A. *The Referral System*

The bargaining agreement between Respondent, which has about 4000 members, and Associated General Contractors of St. Louis provides that Respondent shall be, at least initially, "the sole and exclusive source of referrals of applicants for employment." An employer may, however, hire from other sources if Respondent has not made a referral within 24 hours after a request for referral, and the employer may also, in certain circumstances, request registrants by name. Otherwise, the order of referral is from the registration list on a "first in, first out basis," but the Respondent is entitled to take into account the qualifications necessary to the job in making referrals. Registration is done on the first Monday of each month, and can be renewed each month in person or by telephone; Vitale also testified that after being laid off from a job, a worker can be placed on the list by calling in.

It is clear that these facts add up legally to an exclusive hiring hall. *Carpenters Local 608 (Various Employers)*, 279 NLRB 747, 754 (1986), and cases cited.

B. *Vitale's Intraunion Activities*

In June 1989, Vitale (while still engaged in another occupation) was nominated for recording secretary of the Union on a slate of challengers headed by Audie Laubinger. The union election commissioner rejected Vitale's nomination, concluding that he had not worked in the trade for a sufficient recent period to qualify as a candidate. After the Laubinger slate was defeated in the August 1989 election, Laubinger filed objections to the election under the Labor-Management Reporting and Disclosure Act, one of the objections being that Vitale should not have been disqualified for not being "continuously employed at the trade" since he had

"called in on numerous occasions seeking work within the past year."

Not until February 1991 did the Respondent and the Labor Department reach agreement to conduct a new election. Vitale was nominated this time for the post of auditor on the challengers' slate. At a meeting in March 1991 in the office of the Department of Labor to set the ground rules for the new election, Vitale and his slate were present, as were the officers of Respondent, including Jack Sawyer, its president and business manager. During the meeting, the question arose as to why some members of the slate were not being referred to work. Sawyer replied that the reason was that they "weren't qualified to run anything." Vitale asked Sawyer how he would go about proving his qualifications if that was necessary, but Sawyer did not reply.

A week later, Vitale called Sawyer and posed the same question. Sawyer responded that he had been "a little upset and joking" and that he did not "hold any grudges or anything like that because you opposed me."³

The Laubinger slate lost the August 1991 rerun election. Vitale filed a protest based on the accuracy of the voter eligibility list, but the Labor Department denied it a week later, apparently by informal notice.⁴

C. *Vitale's Work Record*

All that we know about Vitale's referrals from Respondent is based on his testimony. As best as it can be pieced together, he seems to have had no real complaints until after October 1990. From that month on, his single referral was for a 1-day job in April 1991. Around the end of May or the first of June 1991, he was referred to a 1-day job; about 2 weeks later, he was sent to a job of unstated length; toward the end of June, he received a 5-1/2-day referral; in the first week in August, he went on a 3-day job; he received in September a 2-day job, a job that was canceled after he arrived, and a 1-day job; in the first part of October, he was sent to a 5-day referral, and in the latter part of October and first few days of November, he worked a 12-day job. In November, he was recalled to the last project for about 7 days. In rehearsing his recent employment at the hearing on January 13, 1992, he said that he had not worked since November. Vitale filed his charge on November 1, 1991.

D. *Vitale's Request for Information*

Vitale testified that after his objection to the August 1991 election was denied, he assumed that he "was more or less finished working in construction because I wouldn't be getting any work," so he made contact with an organization called Association for Union Democracy, Inc. (AUD). AUD sent him some material on the subject of requesting information from a referral system, enclosing a copy of a letter which included a request for information made to a carpenters' local. Vitale, on August 24, 1991, sent a letter to Respondent's president, Sawyer, containing the following, inter alia:

³ As previously stated, Vitale was the sole witness at the hearing. I saw no reason to discredit him.

⁴ The actual ruling on objections was not issued until September 5.

² Errors in the transcript have been noted and corrected.

I am requesting that all pertinent information regarding the dispatching of jobs to Union Members of Local 513 through its hiring hall and all other means of dispatching be made available to the general membership. This information to include the following:

The names, addresses and telephone numbers of all persons, who for the past six months have asked to be referred to jobs by Local 513 or have asked that their names be placed on a list for job referrals, together with:

- a. The date or dates of each request;
- b. The date or dates of each subsequent referral of such person to a job, including [sic] the name of the person so referred, the name of the employer to whom referred, and identification of the jobsite to which referred;
- c. The date or dates of each hire and of any subsequent layoff or discharge, including the name of the person hired and/or laid off, the name of the employer and the identification of the jobsite.

The aforementioned information to be posted in all three union halls in an accessible area for the members to inspect; and upon request this information be made available by mail to the members.

Vitale's letter also noted that "the legality of this request" was based on information furnished by AUD. He further made reference to the Carpenters case, and he quoted from the notice posted in the case, as enforced by the Second Circuit Court of Appeals.

By letter of August 30, 1991, Vitale's letter was answered by Harold Gruenberg, Respondent's counsel, who wrote that the Board had "repeatedly, and as recently as August 1991, investigated and found that the referral procedures of Operating Engineers Local 513 are lawful." Gruenberg went on to say, "Absent your submission of documented proof rebutting the determinations of the National Labor Relations Board that Local 513's referral procedures are lawful, your request is deemed frivolous and intended to burden Operating Engineers Local 513 with unwarranted expenditure of staff time and considerable costs which the membership of Local 513 would have to bear."⁵ Gruenberg concluded, "If you have proof to support your request, you are invited to submit your proof to me and Local 513 will give it due consideration."

Vitale did not respond to this letter. However, on September 17, the executive director of AUD did, on Vitale's behalf. That letter discussed the applicable law and reiterated Vitale's initial request. No response from the Union was forthcoming.

III. DISCUSSION

As earlier stated, the complaint alleges that Vitale had a right to the requested information because it was "reasonably related to an alleged failure to properly refer Charging Party Vitale to jobs . . . because he engaged in intraunion political activities."

It is not entirely clear why the reference to "intraunion political activities" was deemed by General Counsel to be a

⁵It should be noted that the court of appeals judgment quoted by Vitale in August 24 letter posited that employees were entitled to hiring hall records "on payment of reasonable costs."

necessary element of the allegation. On brief, General Counsel's principal legal argument reads, more simply:

It is well-settled that a Union which operates an exclusive hiring hall breaches its duty of fair representation under the National Labor Relations Act when it arbitrarily denies requests of its members for job referral information, where such requests are reasonably directed toward ascertaining whether such members have been properly treated in connection with the operation of the hiring hall.

This doctrine does not require any particular proof of animus against the applicant, because it rests upon a near absolute view of a union's obligation in this area. As first stated in *Operating Engineers Local 324*, 226 NLRB 587 (1976):

We find that inherent in a union's duty of fair representation is an obligation to deal fairly with an employee's request for information as to his relative position on the out-of-work register for purposes of job referral through an exclusive hiring hall.

In *Miranda Fuel Company, Inc.* [140 NLRB 181], the Board defined the scope of a union's duty of fair representation as "the right [of employees] to be free from unfair or irrelevant or invidious treatment . . . in matters affecting their employment." We agree with the Administrative Law Judge that Melvin Carlson's efforts to protect his seniority rights by requesting Respondent's assistance in determining the names, addresses, and telephone numbers of individuals on either side of his name on its out-of-work register clearly involved a "matter affecting [his] employment." We therefore agree with the Administrative Law Judge that Respondent's arbitrary refusal to comply with Carlson's reasonable and manageable request for job-referral information breached its duty of fair representation and thereby violated Section 8(b)(1)(A) of the Act.

In *Miranda Fuel Company, Inc.*, supra, the Board quoted from an opinion of the Court of Appeals for the District of Columbia Circuit, which stated, inter alia:

Among the most important of labor standards imposed by the Act as amended is that of fair dealing, which is demanded of unions in their dealings with employees. . . . The requirement of fair dealing between a union and its members is in a sense fiduciary in nature and arises out of two factors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary of the first, is the comprehensive power vested in the union with respect to the individual.

We find that Carlson was completely dependent on Respondent for the protection of his referral rights. Business Agent Koski himself testified that Carlson would not have been permitted to copy the names, addresses, and telephone numbers of employees on the out-of-work register. Thus, Respondent's refusal to prepare such a list deprived Carlson of the only means whereby he could fully investigate whether or not his referral rights were being protected. Contrary to our colleague, we find that the Union's comprehensive and exclusive power and authority in this matter affecting Carlson's employment *automatically* obligated it to deal

fairly with Carlson's request for job-referral information. [Emphasis added.]

Since *Local 324*, the Board has repeatedly held that, absent some substantial reason for refusing disclosure, a union is bound to comply with requests for referral data when they may serve some useful purpose related to fair treatment. *Bartenders' & Beverage Dispensers' Local 165 (Nevada Resort Assn.)*, 261 NLRB 420, 423 (1982) (record "naked" of discrimination against registrant, but, in view of fact that hiring hall might make errors, etc., entitlement to records found); *Electrical Workers IBEW Local 575 (Coleman Electric)*, 270 NLRB 66, 70 (1984); *Teamsters Local 282 (General Contractors)*, 280 NLRB 733, 735 (1986) ("an employee is entitled to access to job referral lists to determine his relative position in order to protect his referral rights"); *Operating Engineers Local 825 (Building Contractors)*, 284 NLRB 188, 189 (1987); *Boilermakers Local 374 (Construction Engineering)*, 284 NLRB 1382, 1409 (1987) ("He was entitled to know who was below him on the referral list so he would know if he was being bypassed."); *Service Employees Local 9 (Blumenfeld Enterprises)*, 290 NLRB 1, 3 (1988) (applicant "suspected" wrongful treatment); *Service Employees Local 9 (American Maintenance)*, 303 NLRB 735 (1991).

On the other hand, the Board has at least once, in finding a violation, referred to the fact that the complainant had a "reasonable belief" that he had been discriminated against. *Carpenters Local 608 (Various Employers)*, 279 NLRB 747, 759, *enfd.* 811 F.2d 149, 152 (2d Cir. 1987) (Court as well noted that the standard was whether there was a "reasonable belief that registrants were being treated unfairly"). The clear weight of authority, as shown, imposes no "reasonable belief" requirement—in fact, as indicated, cases such as *Local 324* and *Bartenders' & Beverage Dispensers*, *Local 165* point in the opposite direction—and it seems to me that there should be none. An applicant ought to be entitled, as a matter of right, to inspect hiring hall records to determine whether his employment opportunities have been, advertently or otherwise, interfered with. The information is not, and should not be, secret, and it should be subject to the unrestrained scrutiny of those persons most vitally interested in it without the would-be workers having to make a showing of "reasonable belief" that he or she is the object of hostile treatment.

Accordingly, I would hold that, in the absence of some good reason advanced by Respondent for withholding the information, it should be made available without the necessity of laying a foundation. If I had to reach the question of "reasonable belief" here, I would be somewhat hard-pressed. While Vitale described the scant amount of work to which he was referred prior to writing his August 24 letter, the record is almost completely bare of evidence of other referrals, except as discussed below.

Of course, there is no reason why the General Counsel may not allege that the applicant believed that he had been mistreated by a union because of his protected activity, as counsel for General Counsel interprets the allegation here (Br. p. 13): "Vitale concluded that the Union was failing to refer him because of his political opposition to the incumbent Union officials"), but it adds little to the case. General Counsel is not alleging that the Union did discriminate against Vitale, only that he *thought* so. It would have been

sufficient (or perhaps not even necessary) to allege that Vitale thought that he was not receiving his fair share of referrals (in most of these cases, the allegation is simply that the Union refused to comply with a request for information in violation of Section 8(b)(1)(A), see, e.g., *Local 324*, *supra* 226 NLRB at 595, 596).

Findings here bearing on Vitale's belief could be more specific if there was more evidence in the record. While there were periods in which Vitale received few referrals, there were others, such as between June and October 1991, when referrals seemed to improve; yet during all this time, Vitale was engaged in antiadministration activities. It is very difficult, without more evidence, to compare Vitale's referrals with those of other employees. The only relevant testimony is Vitale's statement that he had heard from "numerous other operators that are working in the trade that there are different people going from one job to the other, spending very little time on the out-of-work list." He mentioned two names, but gave no indication of the dates involved, so that the two instances might have been *after* he requested the information from the Union (as to one of the individuals, Vitale said that he "just went out recently").⁶

Nonetheless, it is my understanding of the law that it is enough to establish a right to hiring hall information that the applicant simply wishes to see it. Good faith, however, would also seem to be a natural requisite. Here, it is unusual that Vitale's request letter asked that the information "be made available to the general membership" and that it be "posted in all three union halls in an accessible area for the members to inspect" and, upon request, be mailed to members as well. I do not believe that this request for general publication indicates bad faith, or otherwise taints Vitale's request. I credit his testimony that he was interested in investigating his own situation; that he may have also desired that the same information be made available to other union members does not detract from the validity of his request. *Carpenters Local 608 (Various Employers)*, *supra* at 757–758.⁷

I also have no doubt that Vitale believed that his referrals were fewer because of his prominent intraunion activities.

Other defenses are often raised in this sort of case, but Respondent did not advance any defenses in its answer, did not present any evidence, and has not filed a brief. Thus, there

⁶General Counsel's brief is in error on several counts, inadvertently, one would hope. At p. 13, it states that while Vitale received few referrals, "many of the operators worked steadily." There is no basis in the record for the quoted matter (the only such reference is Vitale's statement that "there are different people going from one job to another"), as there is none for the succeeding sentence, which states in part: "[S]everal individuals were being referred on a consistent basis and for jobs lasting more than a year in duration." The statement that Vitale was not referred to any jobs between October 1990 and May 1991 is wrong. (Tr. 29.) There is no support in the evidence for the statement at p. 16 of the brief that the list requested by Vitale "would include, at most, 400 members." Vitale said that there is an "average" of "400 people that are usually out of work," but that tells us nothing about the number of requests for referrals made in a 6-month period.

⁷In this vein, I also find insufficient evidence to support a conclusion that, as Respondent was suggesting at the hearing, Vitale was actually seeking the referral information to support his objection to the 1991 election based on the alleged inaccuracy of the voter eligibility list.

is no known reason to be concerned about issues of confidentiality, burdensomeness, or any other defense.

On the basis of the foregoing analysis, therefore, I conclude that Respondent violated Section 8(a)(5) of the Act by failing to furnish the information requested by Vitale on August 24, 1991.

CONCLUSIONS OF LAW

1. Associated General Contractors of St. Louis, and its employer-members, are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing, since on or about August 30, 1991, to supply to Michael J. Vitale the information requested in his letter of August 24, 1991, Respondent breached its duty of fair representation and interfered with, restrained, and coerced Vitale in the exercise of his rights under Section 7 of the Act, thereby violating Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice in violation of Section 8(b)(1)(A) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take affirmative action designed to effectuate the policies of the Act. The information requested on August 24, 1991, would be useless to Vitale at this time. The situation may also have changed, making production of a more current list unnecessary. I shall therefore limit my recommended remedy to a requirement that Respondent refrain from arbitrarily denying referral information to registrants.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The Respondent, Local Union No. 513, International Union of Operating Engineers, AFL-CIO, St. Louis, Missouri, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act by arbitrarily refusing to honor requests for information, made by employees on the out-of-work register, pertaining to the exclusive referral system operated by Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office and hiring halls in the St. Louis area copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members and registrants are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."